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No. 81-523

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTAINER CORPORATION OF AMERICA,
Appellant,

vs.

FRANCHISE TAX BOARD,
Appellee.

On Appeal From The Court of Appeal of the State of California for the First Appellate District

Brief of EMI Limited and Capitol Industries-EMI, Inc. as Amici Curiae in Support of Appellant Container Corporation of America On Merits of the Case

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Brief of EMI Limited and Capitol Industries-EMI, Inc.
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Appellant Container Corporation of America
On Merits of the Case

A letter from counsel for each party, consenting to the filing of this brief, is on file in the Office of the Clerk.

EMI Limited, one of the amici curiae, was granted leave to file and did file an amicus brief in support of jurisdiction as sought by Container Corporation of America. The instant brief addresses the merits, and presents arguments not offered in the prior brief.

INTEREST OF AMICI CURIAE

EMI Limited (hereinafter EMI), is a United Kingdom corporation, which does not have a permanent establishment in the United States, under the United States-United Kingdom Tax Convention, and which does not do business in the United States. EMI has subsidiaries which operate in the United Kingdom and more than 40 other countries, including the United States. Most of the corporations which operate in countries foreign to the United Kingdom are exclusively in the business of recording music or manufacturing and selling recorded music, principally on record disc, but also on tape or cassette. In the United Kingdom EMI subsidiaries conduct a wide range of manufacturing, retail and service businesses, including defense contract work.

EMI has a United States subsidiary, Capitol Industries-EMI, Inc., which in turn has a subsidiary domiciled in Los Angeles, California, which records music, manufactures records, and sell records at wholesale under the name Capitol Records, Inc. Capitol Industries-EMI, Inc., has filed California Franchise Tax returns of income, reporting its income on the Unitary basis, combining its operation inside of California with those outside of it, including those of its subsidiaries. It has not filed its California Franchise Tax return income combining itself with its parent corporation, EMI, or EMI's other subsidiaries. The California Franchise Tax Board has administratively combined Capitol Industries-EMI with EMI and its other subsidiaries, on a "music only" basis, and assessed it accordingly.

EMI has brought an action for an injunction and declaratory relief in the federal district court which that court dismissed on jurisdictional grounds. On appeal, the Ninth Circuit Court of Appeals in EMI, Limited v. Bennett, et al., No. 80-4114, reversed and remanded to the district court for consideration of the merits. Capitol Industries-EMI, Inc. has also brought suit in the federal court, and in the companion case its appeal is before the Ninth Circuit Court of Appeals under the style Capitol Industries-EMI, Inc. v. Bennett, et al., No. 80-4113, on petition for rehearing of the jurisdictional point.

A principal contention of both EMI and Capitol Industries-EMI, Inc., is that the unitary combination which California seeks to impose on the two companies is an imposition on and attempted regulation of foreign commerce, and is barred by the United States Constitution, Article I, Sec. 8, cl. 3, as interpreted in this Court in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

While there may be constitutional limitations against state taxation of the income of a United Kingdom corporation not having a permanent establishment in the United States not presented in the case at bar, the Court's review of this case and reversal of the California decision may well dispose of EMI's case as well as the case at bar.

SUMMARY OF ARGUMENT

1. Internationally accepted custom is one source of international law. Sec. 38(1), Statute of the International Court of Justice; Sec. 36, Statute of the World Court; *Sears v. The Scotia,* 14 Wall. (81 U.S.) 170 (1872); *The Paquete Habana,* 175 U.S. 677 (1900); Restatement of the Foreign Relations Law of the United States, Second, Sec. 1, Comment C. Every treaty on the subject in force, every model treaty both of this Government and of the United Nations and of other international agencies, provides for use of the arms length method in allocating income to source. International practice is to use it between countries without bi-lateral tax treaties. The Solicitor General,

who represents the government in this court, responding to the requests from the Secretaries of State, Treasury and Commerce, and the United States Trade Representative, has informed the Court in his amicus brief in the Chicago Bridge & Iron case, no. 81-349, October Term, 1981, that the United States Government recognizes that the use of the arms length method is international custom. It is, therefore, international law.

The Executive speaks for the United States in our foreign relations, the conduct of which is not entrusted to this court [*Chicago & S. Airlines v. Waterman SS Corp.*, 333 U.S. 103, 111 (1948)] or to Congress [*United States v. Curtiss Wright Export Corp.*, 299 U.S. 319 (1936)]. His statement that the United States accepts the universality between nations of the arms length custom is a statement of the international law this nation accepts, and respects. (Restatement of Foreign Relations Law, Draft Revision, Sec. 132, Comment C.)

The states are, of course, bound by international law as fully as is the Nation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); Article VI, cl. 2; *Nielson v. Johnson*, 279 U.S. 47 (1929); *United States v. Belmont*, 301 U.S. 324, 331 (1937).

EMI Limited, as a foreign juridical national, is entitled to the benefits of international law, and the restrictions international law imposes on governments that would tax it.

2. The Confederation could not govern effectively because the Articles left the states free to tax and impede foreign commerce, to have foreign relations and even to make treaties. The Constitution was intended to remove all of these powers from the states. There was less concern with burdens on interstate commerce. The Constitution should be construed to forbid all state burdens on foreign commerce and not merely those similar to prohibited burdens on interstate commerce. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) correctly perceived the distinction.

3. While international law does not restrict California's right to tax the Container Corporation on its income derived from business done within the United States, it may restrict California's right to tax Container Corporation on its income realized from business done in Colombia, Venezuela and other foreign countries. Compare *Sumitomo Shoji America, Inc. v. Avagliano,* No. 80-2070 and 81-24, October Term, 1981, decided June 15, 1982.

However, the Court need not reach consideration of that possibility. International law condemns use of the combined unitary formula because it burdens the commerce their juridical nationals conduct with the United States. This is foreign commerce. The unitary tax is just as burdensome when it is applied to domestic multinational groups. What the states may not burden is the foreign commerce of the United States, regardless of who conducts it.

Furthermore, to permit a tax on one group of multinationals which international law prohibits on another is a burden on the foreign commerce of one which the other escapes, a classic discrimination. Discrimination between competitors in foreign commerce is itself a burden, and is impermissible.

ARGUMENT

INTRODUCTORY

There are two aspects to the problem the court is faced with in the Container Corporation case: International Law; and the foreign commerce clause (Article I, Section 8, cl. 3). Both, under the United States Constitution, are limitations on the powers of the states to tax. They are not necessarily synonymous limitations, however.

Restrictions may be found on the powers of the states to tax because of the compulsion of the Commerce Clause, and not because any restriction is found in established international law. The decision of this Court in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1978), is an

example. However, in this case there are considerations of international law which the Court should take into account.[1]

I. The use of the arm's length method of determining the income which a Nation has authority to permit its subdivisions to tax, and the avoidance of double taxation through credits, have both become principles of international law, precluding the use by the states of combined apportionment formulae against those corporations entitled to rely on international law

A. EMI Limited, a corporation of the United Kingdom, and its American subsidiary, Capitol Industries-EMI Inc., both have standing to complain of a violation of international law by the state of California and any other states of the union. International law generally deals with the power of a state to enact tax legislation and other legislation exemplifying its power on nationals, whether individual or juridical, of other states.[2] Thus it is a recognized principle of international law that the United States could not tax EMI Limited on any portion of its income, because EMI Limited does not do any business in the United States, and has neither office nor permanent establishment here. Restatement (Revised), Sec. 412(1)(c) and comment (a). Its ownership of a subsidiary is, under international law, the recognized form for it to operate in the United States, and the law of the United States applies fully to that sub-

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[1] In *Japan Line*, supra, this Court relied on international custom to establish a standard by which the states are bound, not as a matter of international law, but under the commerce clause. As we will show, international custom becomes the law of Nations, by which the states are also bound.

[2] The custom in international law and communications between governments is to refer to Nations as states. In discussing international law within the United States, the political subdivisions of the United States comprising the United States are referred to as States of the Union. To avoid the use of the same word with different meanings in different sections of this brief, we shall hereinafter refer to the Nations of the world as Nations, and to States of the Union as states.

sidiary, but without disregard of corporate entity. *Sumitomo Shoji America, Inc. v. Avagliano,* decided June 15, 1982, Nos. 80-2070 and 81-24, Oct. Term, 1981. Restatement of Foreign Relations Law, Second, Sec. 27, Sec. 172; Restatement (Revised) (1982) Sec. 216, Sec. 418, comment (b).[3] However, the United States is not so limited in taxing Container Corporation, since that corporation is a national of the United States. Restatement (Second), Sec. 27; Restatement (Revised) Sec. 418. Nevertheless, in taxing Container Corporation, the United States is bound to give effect to Venezuelan law where it places limitations on the Venezuelan subsidiary, since the Venezuelan subsidiary is a national of another nation. Cf. *Sumitomo Shoji America, Inc. v. Avagliano, supra.* Restatement (Second), Sec. 30, comment (b); Restatement (Revised) Sec. 418(4). Venezuela is but one example, typical, perhaps, of each of the nations in which Container Corporation has subsidiaries operating which are incorporated under the laws of that host country. It is not our purpose to demonstrate that there are such foreign restrictions, but to suggest that they may exist, and that possibility is a consideration always to be kept visible in the background in analysis of the international law aspects of this entire issue. It is obviously most clearly evident, and is a foreground consideration, in analyzing the tax status of foreign parent corporations, such as EMI Limited, operating in the United States only through a separately incorporated subsidiary, and bound by the Official Secrets Act of the United Kingdom not to reveal to any foreign government any financial or other information about its activities as a defense contractor for the United Kingdom forces.

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[3]Hereafter the Restatement of the Foreign Relations Law of the United States, Second (1965) will be cited simply as Restatement (Second). The Draft Restatement of the Foreign Relations Law of the United States (Revised), still in process with three volumes published but not finally approved, will be cited as Restatement (Revised).

International law is found in treaties, but not exclusively there. It is also found in enactments of the United Nations, in the statutes creating and the decisions of numerous international courts, such as the International Court of Justice and the World Court, and, most importantly, in custom. Restatement (Second), Sec. 1, Comment C; Restatement (Revised) Sec. 102; Article 38(1), Statute of the International Court of Justice;[4] Statute of the World Court, Art. 36, to which the United States acceded in 1926.

This Court has recognized that internationally accepted custom is international law. As such, it has been given effect by this Court, binding nationals of the United States, and governing this Court in its decisions. *The Paquete Habana*, 175 U.S. 677 (1900), *Sears v. The Scotia*, 81 U.S. (14 Wall) 170 (1872). The first cited case dealt with the principle recognized by international custom that fishing vessels were not subject to capture as prizes of war. No treaties to which the United States was a party so provided, or dealt with the subject. The Court said, however,:

> "By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargos and crews, from capture as prize of war." (175 U.S. at 686).

The Paquete Habana was therefore held not subject to capture as a prize of war, because of the restrictions of international law.

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[4]Article 38(1) reads as follows: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The *Scotia*, supra, was also an example of custom governing the rules of the sea, not found in any treaties, but which had evolved into a principle of international law. The case arose in the 19th century, when steamships were plying the same seas as sailing vessels but had not supplanted them. Because of the superior maneuverability of steamships, the custom had evolved that they must give way to sailing vessels to avoid collision. After surveying the regulations which had been evolved by thirty countries, but without treaties governing the subject, this Court concluded that that was sufficient custom to become a basis of international law. The Court held, accordingly, that the decision in the case was governed by that custom, as one of international law which the courts of the United States must apply. To borrow language this Court later used:

> "International law . . . has at times, like the common law . . . , a twilight existence (while) the gradual consolidation of opinion and habits . . . has been doing its quiet work." (*New Jersey v. Delaware*, 291 U.S. 361, 383-384 (1934)).

The recognition of custom as international law, while an old principle, is still respected, and still represents internationally recognized international law. Restatement (Second), Sec. 1, comment c; Restatement (Revised) Sec. 102; Statute of the International Court of Justice, Sec. 38(1) (supra footnote 4 p 7); *McCulloch v. Marineros de Honduras*, 372 U.S. 10, 21 (1963).

In the present case, we have an evolved international custom, respected by nations of the world, and particularly the treaty nations since they have bound themselves by bilateral treaties to enforce common standards about the source of taxable net income and the prevention of double taxation. This Court has been informed by the official representative before it of the Executive of the United States government that it is the view of that government that there is an international custom, embodied in many treaties but also in international practice where

treaties are not in force, limiting jurisdiction to tax to the income earned within its borders, and to the determination of that income by the armslength fair price method, to avoid double taxation. See also Restatement (Revised), Sections 411, 412(1)(c) and 413. The Reporter's Comment, set forth in Appendix A hereto, discusses the subject in a manner which we believe has not before been called to the Court's attention. It is to the same effect as what the Court has learned from other sources, however.

In addition, as this Court has been informed repeatedly, the government of the United Kingdom for itself, and also both it and the government of Italy, in each instance acting as president of the Commission of the European Economic Community, for that community of ten nations, have filed diplomatic representations with the Department of State stating that there is an internationally recognized standard and protesting the departure from it by California and other states which have been most prominent in ignoring that international standard.

The Executive has informed both this Court and the Congress that the consolidated unitary formula applied by those states conflicts with internationally recognized practice established by treaty and custom. Judicial recognition should be given to that fact, and the necessary corollary that it is prohibited by international law, where the economic effect of the tax would fall on a national, individual or juridical, of another nation. Thus Secretary Blumenthal, Assistant Secretary Laurence Woodworth, Assistant Secretary Donald Lubick, and now the Solicitor General have stated that the Executive recognizes that international practice, and have stated that the states should be bound by it in their own taxing policies. Moreover, testimony before the Senate Foreign Relations Committee in 1977 was to the effect that the previous administration (before the Carter administration) had also recognized that principle and in deference to it had acceded to the British request that an explicit prohibition of violation of the principle by a state

should be placed in the United States-United Kingdom Income Tax Convention then being negotiated. (See Appendix B for statement of former Assistant Secretary of the Treasury, Charles Walker.)

This Court has held repeatedly that in foreign relations the United States must speak with a single voice and has stated also that ordinarily that voice is that of the Executive. (*Baker v. Carr*, 369 U.S. 186, 211 (1972); *Japan Line Ltd. v. Los Angeles County*, 441 U.S. at 449; *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *United States v. Belmont*, 301 U.S. 324 (1937); *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876)). The governing principle has perhaps never been stated more eloquently then by this Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1937):

> "Not only, as we have shown, is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes *treaties* with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate can not intrude; and Congress itself is powerless to invade it. As Marshal said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external affairs, and its sole representative with foreign nations.'"

Thereafter the Court characterized the Presidential power in the following terms: (299 U.S. at 320):

> ". . . the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power that does not require as a basis for its exercise an act of Congress. . . ."

Later, in *United States v. Shaughnessy*, 338 U.S. 537, 542-543 (1950), this Court stated that the admission of aliens into the United States was solely within the prerogative of the President to govern, and he could do it with or without specific act of Congress. The language this Court used was:

> "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304; *Fong Yue Ting v. United States*, 149 U.S. 698. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with the legislative power. It is implementing an inherent executive power."

In an ensuing paragraph the court again said that "the power of exclusion of aliens is also inherent in the executive department of the sovereign, . . ."

Later cases recognize this principle. Thus in *Baker v. Carr*, 369 U.S. 186 (1972), this Court analyzed the effect of determinations by the other branches of government in the field of foreign affairs, and stated that (369 U.S. 186, at 212) "the judiciary ordinarily follows the executive . . ." in such matters.

Finally, and most recently, in *Dames & Moore v. Regan*, ... U.S. ....., 69 L.Ed 2nd 918 (1981) this Court upheld the validity of the provision in the Executive Agreement by which the American hostages were returned by Iran, which removed settlement of American claims against Iranian assets from the courts, where litigation to enforce them was pending, and vested it exclusively in an agency created by the joint agreement of the executives of the two affected countries. The Court examined legislation Congress had adopted and concluded that it neither authorized nor forbade what the Executive Agreement had done, and hence the authority for the agreement must be found in the

Executive's power. The Court upheld the Executive Agreement, even though the effect was to remove jurisdiction from the courts in litigation already pending.

The principle is so well established that it is stated in the Restatement (Revised) Section 132, and comment c. to that section. The words of the comment are these:

> "Courts give particular weight to the position taken by the United States government because it is desirable that so far as possible the United States speak with one voice on such matters. Compare *Baker v. Carr,* 369 U.S. 186, 217 (1972), quoted in Introductory Note to Scope, P4. The views of the United States government, moreover, are also state practice, creating or modifying international law. See Section 102 and Comment b. Even views expressed by the Executive Branch as a party before the court or as *amicus curiae* will be given substantial respect since the Executive Branch will have to answer to a foreign state for any alleged violation of international law resulting from the action of a court."

As we have shown, international law arises from internationally accepted custom, and this need not be in writing. Section 102, Restatement (Revised) states that international law is that which has been accepted as such by the international political system (a) in the form of customary laws; (b) by international agreements; or (c) by derivation from general principles of law common to the major legal systems of the world. The Statute of the International Court of Justice, Sec. 38(1), expressly states that international custom becomes international law. (Footnote 4, supra p. 7)

Customary international law results from a general and consistent practice of Nations followed by them from a sense of legal obligation. Even between the United States and non-treaty nations such as Venezuela and Colombia the tax principles found in the treaties are applied. See Restatement (Revised) Sections 411, 412(1)(c) and 413. This

adherence by non-treaty nations to the tax principles in treaties is an example of this growth of international law.

We have seen that the treaty nations and the United States have agreed that double taxation will be avoided, and that the method by which it will be avoided is to use the armslength fair price method in testing whether international commercial transactions between commonly owned corporations are at unrealistic prices having the effect of distorting the source of taxable income, and providing for the reconstruction of the proper taxable income by the fair price method. As this Court recognized in *Japan Line*, neither by treaty nor custom have nations agreed to avoid double taxation by using a common apportionment formula, and they have not agreed to either a method or tribunal for settling disagreements about the operation of the formula. They have agreed instead, by treaty where such treaties exist and by custom where they do not, to tax only the income earned within their borders and to ascertain it by the fair price armslength method. This is recognized as international law. Restatement (Revised), Section 411 and 412 and Reporters' Notes, comment 3. The Restatement (Revised) also declares that the United States' view of international law is that it requires either the exemption of income a nation could tax or a credit for taxes paid elsewhere to avoid double taxation. Section 413. Every state using the combined formula violates this rule, because not one of them allows a credit for foreign taxes, or even a deduction.

The formula has no interest in the armslength method. Instead it makes a conclusive assumption that all world business is conducted in the same manner, at the same mark-ups, at the same labor costs, and the products are sold at the same prices to customers, wherever manufactured, and wherever sold. The Court has been told repeatedly in briefs of the parties and of other amici curiae that statistics and other sources of judicial notice demonstrate that those assumptions are contrary to the fact, and indeed

we suspect that the Court has sufficient economic sophistication to know without prompting that those assumptions are economic nonsense. So we see the American states attempting to use a standard which international practice disavows, between both treaty nations and non-treaty nations. The fair price method is respected in tax practice between the United States government and the government of such nations as Venezuela, Colombia, Peru, Chile, and other countries with whom the United States does not have bilateral income tax treaties. Section 482 of the Internal Revenue Code of the United States does not distinguish between treaty nations and non-treaty nations, and Treasury practice as well as international practice is to make no such distinction, either. The fair price method is used between all nations, including those in which Container Corporation has foreign subsidiaries.

The states of the union are, of course, bound by international law. The Constitution explicitly provides so (Article VI, Section 2; Article I, Section 8, cl. 10), and this Court has often so held. *Nielsen v. Johnson,* 279 U.S. 47, (1929); *Kolovrat v. Oregon,* 366 U.S. 187 (1961); *United States v. Belmont,* 301 U.S. 324 (1937). The first case involved the binding effect of a treaty on state taxation. The court has not distinguished between treaties and other sources of international law and has held the states bound by international law from whatever source derived. *Banco Nacional De Cuba v. Sabbatino,* 376 U.S. 398, 425 (1964); and see also Restatement (Revised) Section 135(1).

We believe the foregoing discussion demonstrates that the question of the application by the states of the United States of a combined unitary formula to reach the income of foreign parent corporations which operate in the United States only through American subsidiaries is a question of international law, not of state law or even exclusively of United States constitutional law, and that international law has evolved from the settled international practice of using the armslength method between nations. When the official

representative of the Executive in this Court, the Solicitor General, at the request of the Secretaries of State, Treasury and Commerce, and the United States Trade Representative, acting in response to the urging of a majority of our leading foreign trading partners through their official channels, appears in this Court and informs this Court that the Executive Branch recognizes the existence of a settled practice of nations, this Court will, under its settled precedents, recognize that the Solicitor General has spoken as the Executive, and that his statement of views is that of the single voice by which the United States speaks in foreign affairs. It is a declaration to this Court that the United States Government recognizes this "settled" practice as international custom. International custom is international law.

In the conduct of relations between nations, the Executive's recognition of a certain rule as international law is not subject to reconsideration by the other branches of government, or by the states. The states must conform their taxing principles to the fair price armslength method. When the Executive informs this Court that is the sole standard permitted by the international law this Government recognizes, then it follows that any other method, including the combined unitary formula, is unconstitutional because it is contrary to international law.

The foregoing analysis of the views of the Executive communicated through the Solicitor General is a proper distillation of what this Court has held in the past. The "sole voice," "sole organ" statements found repeatedly in this Court's opinions necessarily represent a recognition that some one branch of government possesses that voice. Also, the doctrine means that that voice cannot be drowned out by another governmental voice, state or federal.

This Court's decisions, not only its words, recognize the point. Thus the delegation of powers rule is not offended by an indistinct statute delegating to the President the power to restrict immigration of aliens, for he has the

power without the legislation. *United States v. Shaughnessy,* 338 U.S. 537; *Fong Yue Ting v. United States,* 149 U.S. 698 (1893). Similarly, the breadth of the delegation to the President of authority to grant or deny licenses to operate commercial airplanes in foreign commerce did not present a delegation problem because of the President's inherent powers. *Chicago & Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103 (1948). Also, the same case held that the President need give no reason for his exercise of that power because it is not subject to judicial review. *Id.* Perhaps of even greater significance is the fact that the landmark case *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 311 (1936), also involved an issue of overbroad delegation of power to the President in the field of foreign affairs, and the Court held that the President's power to act alone in that field was so great that there could be little room in that area for the unlawful delegation concept. The force of the emphasis on the vast scope of Presidential power to act alone if need be in foreign affairs is greatly increased by the fact that in the previous year the Court had invalidated a delegation of authority to the President as overly broad where it dealt with domestic affairs. *Schechter v. United States,* 295 U.S. 495 (1935). Hence the Court had to be very serious when it said (299 U.S. at 319):

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."

Quite recently this Court has had two occasions to consider the Executive power in foreign relations, first in *Haig v. Agee,* ..... U.S. ....., 69 L.Ed. 2d 640 (1981), and three days later in *Dames & Moore v. Regan,* ..... U.S. ....., 69 L.Ed. 2d 918 (1981). We have already analyzed *Dames & Moore,* supra p. 11. *Haig v. Agee* upheld the power of the Executive to cancel the passport of a United States citizen residing abroad, although the statute in question did not explicitly confer the power. The Court noted that neither

did the statute deny the power, and pointed out that the President had issued and denied passports under his prerogative before 1856, when the first statute on the subject was passed. The Court observed that that confirmation of presidential power occurred in order to vest it in him solely and deny it to the states (69 L.Ed. 2d at 654, footnote 27). The Court also spoke of the weight of administrative construction (69 L.Ed. 2d at 652):

> "This is especially so in the areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval."

So here, the absence of enabling legislation does not imply either Congressional disapproval or an absence of Presidential power. Quite the contrary, for if there is not Presidential power then there is a vacuum in which the United States has no voice in its own foreign affairs, a situation not to be countenanced. *United States v. Curtiss-Wright Export Corp.*, supra, 299 U.S. at pp. 317-318.

Previous Executive agreements were reviewed in the opinion. Among the most famous is the Litvinov Agreement ancillary to the Executive's decision to recognize the Soviet regime as a legitimate government. In *United States v. Pink*, 315 U.S. 203 (1942), the Court upheld the power of the Executive to enter into the Agreement even though one aspect of it was to overrule a property decision of the New York Court of Appeals. Previously it had held that agreement superior to the public policy of New York, which did not recognize the validity of uncompensated expropriations. *United States v. Belmont*, 301 U.S. 324 (1937).

Since the power of the Executive to act alone in representing the interests of this nation in foreign affairs is so firmly established, there remains only the question whether the power to determine that an international usage or practice has become so firmly and generally recognized by Nations as to have become international law rests in the Executive. We submit that to be effective it can repose in

no other branch. It cannot repose in the judiciary, for the judiciary cannot give advisory opinions, and the main thrust of any recognition of a commonly accepted international usage as international law is present and prospective. It means our nation does and will respect it in votes at the United Nations and its agencies, on the high seas, and in the countless forces agreements this nation has with the nations where we have bases. There are, obviously, other examples as well. The Supreme Court fully stated its own views of the reasons the judiciary cannot share in the power to conduct foreign relations in these words (*Chicago & S. Air Lines v. Waterman SS Corp.*, supra, 333 U.S. at 111):

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.*" (Emphasis ours.)

The "political power" the Court referred to was that of the Executive. Neither can the power to recognize inter-

national law require congressional approval in order to exist, although it surely can be regulated by Congress to some extent, because the proper exercise of the power requires facilities Congress does not possess. Our embassies and consulates abroad are of the Executive Branch and are, as this Court has said, the President's eyes and ears abroad. It is to the Department of State that representations are made by other nations that certain conduct has been so universally rejected as proper conduct by nations that its prohibition is a mandate of international law. Those nations must negotiate that recognition with the President, not the Congress.

Approached differently, Congress does not conduct the foreign affairs of the United States. The President does that, for he "alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, supra, 299 U.S. at 319. As an aspect of foreign affairs, the determination of what international customs and practices are to be recognized by this Nation as binding on it under international law is in the President.

These views, we believe, will govern this Court when it considers the status of a foreign corporation such as EMI Limited. We recognize that the power of the United States and hence presumably of its political subdivisions to tax American corporations is not governed by international law, but derives exclusively from the Constitution, and the domestic legislative powers it recognizes. Yet international law may govern the extent to which the United States and its political subdivisions may reach out to foreign countries and assert the power to inquire into transactions conducted in those foreign countries by subsidiaries formed in those countries but owned by American parent corporations, and also to tax income derived from those transactions. Thus a foreign nation, such as Colombia, might find that the economic effect of the use by the States of the combined unitary formula could be to com-

pel the American parent corporation to withdraw more income from Colombia's subsidiary than Colombia felt compatible with its foreign exchange laws, because of the impact of such payments on Colombia's balance of payments in respect of the United States, and such incompatibility would be a matter of concern under international law, and could prohibit the state's formula being applied. See *Sumitomo Shoji America, Inc. v. Avagliano,* supra. Certainly, it could be anticipated that any foreign country would both resent and resist any effort by a state to send a tax auditor into that foreign country for the purposes of verification of information supplied by the parent corporation to the taxing state.

B. Another aspect of international law which the states' combined unitary formulae violate is the recognition in international law that deductions or credits for foreign taxes on the same income should be allowed, since there should not be double taxation of the same income. See Section 413, Restatement (Revised).

Since 1919, the United States revenue laws have permitted the foreign income taxes to be a credit against the United States income tax, where a credit is not allowed in reverse, to avoid double taxation. This provision appeared in the 1919 act as Sections 222 and 238, and will now be found in Section 901 of the Internal Revenue Code. The United States is a party to 40 bilateral income tax conventions, a few of which have not yet been ratified, and all of them provide for the allowance of credits, either by the United States or by the foreign government, depending upon which is the country of domicile and which is the country where the income has been earned. The model draft of the Income Tax Convention published by the League of Nations and by the Organization for Economic Cooperation and Development so provide also, as do the London and the Mexico Model Tax Conventions. The Organization for Economic Development taxation convention, in Articles 23(a) and 23(b), prohibits double tax-

ation and provides for credits. Finally, The United Nations Model Double Taxation Convention between Developed and Developing Countries, United Nations Document ST./ESA/102, likewise contains provision for such credits.

It is apparent that the avoidance of double taxation has become an internationally recognized objective, found in all bilateral income tax treaties to which the United States is a party, in such treaties between other countries, and in the model conventions of the United Nations and other international organizations. In such circumstances, with such virtual unanimity between Nations, the practice of the United States in these treaties is a recognition of the existence of an international standard which has become international law. It is custom which has become universal, and as such is international law. The states should be held bound by this international law, and their uniform failure to allow either a deduction or a credit for the foreign income which they reach out to tax by the formula is unconstitutional as in violation of international law.

C. These views are essentially similar to those this Court expressed in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 424 (1979), except that there the invalidated apportionment did not involve a type of tax which had produced a network of bilateral treaties and a series of model treaties proposed by the United States, the United Nations and others. The evidence of custom ripening into international law was less compelling there than here, but the result the Court reached was precisely the same as it would have reached had it treated the custom as international law instead of an international policy the foreign commerce clause respected.

II. The history of the failure of the Confederacy and the substitution of the Constitution shows that the tolerance of some state burdens on interstate commerce does not extend to burdens on foreign commerce

The failure of the Articles of Confederation to provide a workable Union, and the impetus behind the substitution

of the Constitution for the Articles, were primarily because the Articles left each State free to tax and impede foreign commerce, and to have its own foreign policy.[5] The Framers of the Constitution were determined to correct those weaknesses and deprive the states of all jurisdiction over foreign commerce and foreign policy.[6] The last holdouts in the ratification process realized this and their reluctance to surrender the commercial advantage of their seaboard location was because of their knowledge.[7] Unless the lessons of history are lost on us today, the states must be denied their effort in this case to reclaim some of that surrendered power.

By applying its apportionment formula to foreign source income regardless of whether derived from discrete foreign businesses, and regardless of whether foreign income from foreign commerce can be determined by the arms length methods Nations use to determine what they can tax, California is doing what the Framers of the Constitution resolved no state could ever again do; have independent foreign relations and burden the Nation's foreign commerce by repressive taxation.[8]

The failure of the Confederation so soon after the Treaty of Independence, due to the emergence of commercial rivalries between the states, each of which was free to have and pursue its own foreign policy, make treaties, and burden the foreign commerce of its neighbors, led the Framers of

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[5]*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976); I Curtis, History of the Constitution of the United States (1854, Harper and Brothers, N.Y.) 148, 179-180, 276; II Curtis, op. cit., pp. 11-14, 289-298; 3 Farrand, The Records of the Federal Convention of 1787 (1911), Appendix A, CCCCI, 539, 547-548.

[6]II Curtis, op. cit., pp. 11-12, 13-14, footnotes; The Federalist XLIV (Jay); The Federalist XI (Madison).

[7]II Curtis, op. cit., pp. 23-24.

[8]II Curtis, op. cit., pp. 289-298; James Madison, Preface to Debates in the Convention of 1787, set forth in 3 Farrand, op. cit., Appendix CCCCI, 539, 547-548.

the Constitution to agree that those practices must be prohibited. There was debate over whether the states should remain free to regulate trade between themselves but none over the termination of their freedom over foreign commerce. Therefore the Constitution removes from the states any power over foreign relations and over foreign commerce. Any state regulation of foreign commerce is a burden the Framers meant to prohibit.

Against this historical background, the distinction this Court drew between foreign commerce and interstate commerce in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), is not only sound, but an inevitable lesson of history. Some state burdens on interstate commerce may be tolerated by the silence of Congress to prohibit them, but not on foreign commerce. Only the Federal government can regulate that.

III. State taxation of domestic multinational groups by a method more onerous than the method international law requires be used in taxing foreign multinational groups is a burden on foreign commerce

The practices which are violations of international law when applied against corporations which are nationals of foreign countries are unconstitutional burdens on foreign commerce when applied to corporations which are nationals of the United States. Because they are burdens is why international law prohibits them. The Executive, through his representative before this Court, the Solicitor General, has informed the Court that the operation of the states' combined unitary apportionment formula has become a burden on foreign commerce. In his brief he has stated that the clearest and most obvious burden is felt when the states attempt to impose that taxing method on a multinational group with a foreign parent, but he has also stated that the burden also exists when they attempt to apply it to domestic corporations with foreign subsidiaries conducting their business in other countries, which are themselves sovereign countries.

This Court stated its recognition of the ability of the Executive to sense the effect of intrusions by other forces into the conduct of our external affairs, in a case previously cited, *United States v. Curtiss-Wright Export Corp.*, supra. We quoted above some of the Court's language in that opinion, and we again quote the most essential and significant statement of awareness of the subtlety of manifestations of foreign impact:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the Nation." 299 U.S. at 319.

From what this Court has recognized is a superior listening post, the Executive has discerned a burden on the foreign commerce of this nation, which is one manifestation of its external affairs, and that it burdens the foreign commerce of this nation whether it is conducted by foreign corporations or by domestic corporations, through foreign subsidiaries.

The use by American parent corporations of subsidiaries incorporated under the laws of the foreign countries is mandatory as a practical matter. These foreign countries are themselves sovereign, and hence they have the sovereign's authority to pass laws, create conditions for operation of businesses, and conditions for shipment of profits done from business within their borders to the American parent. To avoid a conflict between requirements of United States and those of the host country, therefore, it is essential that a foreign subsidiary, fully amenable to the laws of the host country, be established. This is particularly vital in those countries, such as Mexico, which require some equity participation by their own nationals in foreign controlled operations in their country. Not only are these foreign subsidiaries convenient, but it is apparent that they are in most instances practical necessities. For the states to disregard their existence and treat the operations abroad as being conducted by the American parent, and as

being conducted, contrary to notorious fact, in an economic climate parallel to that in the United States as to price levels, wage levels, margins of profit, and other essentials of economic success in commercial transactions, impresses us as being a burden on foreign commerce by definition. But the Executive, who has commercial attaches in embassies, consular offices whose function in part is to assist American business abroad, and an entire department devoted to foreign commerce, whose head (the Secretary of Commerce) has protested to the Solicitor General that what the states are doing is a burden on foreign commerce which should be stopped, has declared that it is. The evidence which this Court spoke of in *Japan Lines* is even more abundantly present here.

Finally, in this aspect of the discussion, the Court spoke in *Japan Lines* of the danger of retaliation if a formula suitable for taxation in internal commerce were applied to foreign commerce, since the foreign countries could not be compelled to surrender taxing jurisdiction to the American states. That retaliation has occurred and is present for this Court to consider, in viewing the available evidence of the effect on foreign commerce of the states' combined unitary formula. The Court has been told of the British retaliation for the action of a Senate minority in blocking approval of the explicit prohibition in the new treaty of what the states are doing here, insofar as British parent corporations and their domestic subsidiaries are concerned. The treaty had to be returned to the United Kingdom for reenactment by the Parliament. The testimony of Assistant Secretary of the Treasury Lubick, and particularly the letter which he wrote to the Senate Foreign Relations Committee members when the new provision the British insisted be added to the treaty was before the Senate for ratification, show that the new provision was placed in the treaty by the British in retaliation for the removal of Article 9(4). Secretary Lubick explained the adverse impact of the new provision on American business, and its benefits to the United King-

dom. A price was exacted for the blocking of approval of Article 9(4) by a minority of the Senate. This is the first retaliation, apparently, but more is to be expected if this state taxing method is approved by this Court, in view of the volume of protests which have been voiced to this government by the members of the Common Market, by the Canadian government and now also by Japan. We urge that this irritant be removed by this Court before its adverse impact on our relations with other foreign countries becomes similarly evident and outspoken.

While international law, which prohibits the states' applying their combined unitary formula to a corporate group headed by a foreign parent corporation and thereby to reach for taxation some of the income of that foreign parent, does not restrict the states in the same way when attempting to tax a United States parent corporation with foreign subsidiaries by the same combined unitary method, a related principle may do so. Regulations within the states' traditional areas of jurisdiction will fall, absent a treaty or the compulsion of international law, "if they impair the effective exercise of the Nation's foreign policy." *Zschernig v. Miller,* 389 U.S. 429, 440 (1968). This Nation's foreign policy is to refrain from double taxation of international income. Compare *McCulloch v. Marineros de Honduras,* supra, 372 U.S. 10, where a neutral federal statute was construed not to apply to foreign merchant seaman in order to avoid embarrassment to our foreign relations.

However, we submit that there is a direct constitutional bar here, because the states' formula is a burden on foreign commerce, prohibited by the United States Constitution. If international law prohibits the states' applying their combined unitary formulae to multinational groups headed by a foreign parent corporation, as we contend, and if there is not a corresponding prohibition against the states applying that formula to multinational groups headed by American corporations, a discrimination between foreign groups and domestic groups is established. If this results in a

heavier state tax burden for the domestically-owned multinational groups than for the foreign-owned groups, that discrimination impairs their competitive position and itself becomes a burden on foreign commerce. We do not believe it reasonable to consider that the foreign commerce clause can permit the states to discriminate against American owned multinational groups. If they are not permitted to compete on equal terms with their foreign opposite numbers, then they are burdened in the conduct of their foreign commerce. Inequality of treatment when translated into economic consequences is itself a burden on foreign commerce and as such is unconstitutional.

This Court has long and consistently held that a state tax system which discriminates against commerce is a prohibited burden on it. *Maryland v. Louisiana,* 451 U.S. 725 (1981). A tax system which burdens some foreign commerce but not all discriminates against some foreign commerce and burdens it. This the states cannot do.[9] The discrimination cannot be overcome by extending the scope of the unitary formula to tax the foreign-earned income of foreign multinational groups, so it must be overcome in the only way in which it can be: by restricting the power of the states to burden the foreign source income of domestic multinationals. Essentially that technique was used in *Japan Line Ltd. v. Los Angeles County,* supra, 441 U.S. 434, where the property was physically within the taxing county but jurisdiction to tax was denied because the home country had jurisdiction to tax which the United States could not control.

Furthermore, consideration of the reason behind the international custom which has evolved into international law shows that it evolved in order to avoid unacceptable burdens on the commerce the nations of the world conduct

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[9]*Matson Navigation Co. v. State Board,* 297 U.S. 441, (1936), construed the Equal Protection Clause, not the Foreign Commerce Clause and did not involve income earned and taxed abroad.

with each other. The rules evolved to remove burdensome taxation of income earned in another country, and to prevent double taxation, and they accomplish this in part by acknowledging the prior claims to taxation in the country where the business is done over the claims of the home country, producing a custom in which the latter defers to the former in allowing credits for taxes paid. The states offend the foreign commerce clause in two ways: they impose the burdensome double tax, and they make no effort to ameliorate it through a credit, or even a deduction. The burden they impose on the foreign commerce of domestic internationals, accordingly, is greater than that which the international community finds acceptable when dealing with the juridical nationals of other countries.

The dimensions of this burden on foreign commerce are seen from the record in the Container Corporation case. According to the computations found in Container Corporation's amicus brief filed in the Chicago Bridge & Iron case (No. 81-349, Oct. Term 1981), Container's California income is more than doubled by the combined unitary formula, and the cause is not business done between California and Venezuela, for example, for there is none, but is the minutiae the state courts have declared represent unitary characteristics. Such an increase in income cannot possibly come from that minutiae, as this Court held on June 29, 1982 in *Asarco, Inc. v. Idaho Tax Commission,* No. 80-2015, and *F. W. Woolworth Co. v. Taxation and Revenue Department,* No. 80-17745. The Court may readily conclude that Container Corporation is not unitary with its foreign subsidiaries under the standards stated in those cases, but we hope the Court will also deal with the broader aspects of the case, and state its agreement that international law, the single voice doctrine, and the foreign commerce clause all prohibit the extension of the combined unitary formula system to income earned from operations in other countries.

We conclude our argument by acknowledging that there is language in the opinion in *Mobil Oil Corp. v. Comm. of*

Taxes, 445 U.S. 425 (1980) which, when removed from the context of the issue framed in that case, could suggest that the Court has already prejudged the suitability of a formula to allocate foreign source income. We believe the Court does not decide issues which the parties before it concede, and that it was merely acknowledging Mobil's concession that in its case the formula used could be applied to its business income (445 U.S. at 434). The Court said (445 U.S. at 437) "Indeed, in its Vermont tax returns, Mobil included all its operating income in apportionable net income, without regard to the locality in which it was earned." As the *Caterpillar* case (No. 81-349, Oct. Term, 1981) demonstrates, a formula sometimes operates to a taxpayer's advantage. Moreover, the Court said that Mobil had failed to introduce any evidence that its foreign operations were "distinct in any business or economic sense from its petroleum sales activities in Vermont." 445 U.S. at 439. Finally, in both *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, 223 (1980), and in *Asarco, Inc. v. Idaho State Tax Commission,* supra, slip opinion, p. 11, this Court referred to the now famous "linchpin" statement in *Mobil* as referring to "state income taxation of an *interstate* enterprise" (Emphasis ours). We conclude the foreign commerce issues remain open issues.

The Court may ponder why a United Kingdom parent corporation and its American subsidiary should be concerned by the plight of their American owned competitors. The answer is that the combined unitary formula is a festering sore in the international commercial world, which breeds distrust and antagonism which are of no benefit to anyone in foreign commerce, and undoubtedly will produce further international reaction. Immunity in some but not in all would simply increase antagonisms. International commercial relationships are conducted most effectively when the competition between those manufacturing and selling goods in international commerce is on the basis of quality, price, service, and other commercial considera-

tions, and not when one group of competitors is burdened by an aberrant tax burden from which the other competitors are free.

Furthermore, although EMI Limited and its American subsidiary, Capitol Industries-EMI, Inc. are convinced that they are immune from this burden under International law, they have had to proceed to the federal courts to vindicate their position, and those courts have not yet finally rendered judgment. The State of California does not agree that a distinction exists between foreign-based multinationals and domestically-based multinationals and wants to tax them all, in the same way. EMI Limited and Capitol Industries-EMI, Inc. therefore have that interest also in a decision from this Court which would eliminate the problem for all corporations engaged in foreign commerce.

CONCLUSION

The decision below is erroneous and should be reversed.

Respectfully submitted,

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Appendix A

Restatement of the Law, Foreign Relations Law
(Revised; Tentative Draft)

§ 412. The Basic Rule Applied

(1) A state has jurisdiction to tax the income of:

(a) persons (whether natural or juridical) who are nationals, residents, or domiciliaries of the state, whether the source of the income is within or without the state;

(b) natural persons present in the state, and natural or juridical persons doing business in the state (although not nationals, residents or domiciliaries of the state), but only with respect to income derived from or associated with presence or doing business within the state; and

(c) natural or juridical persons not nationals, residents or domiciliaries of the state and not present therein, only with respect to income derived from property located in the territory of the state.

(2) A state has jurisdiction to tax property located within its territory, without regard to the nationality, domicil, residence, or presence of the owner of the property.

(3) A state has jurisdiction to tax transfer of wealth (a) if the wealth consists of property located in its territory, or (b) as regards property not located in its territory, if the transfer is made by or to nationals, domiciliaries, or residents of the state.

(4) A state has jurisdiction to tax transactions which occur, originate or terminate in its territory or which have a substantial relation to the state, without regard to the nationality, domicil, residence or presence of the parties to such transactions.

Comment:

a. Implied limitations on jurisdiction to tax. The rules in this section affirming a state's jurisdiction to tax clearly imply some limitations on that jurisdiction: a state may tax a foreign company not having its headquarters in the state but doing business in the state on the income derived from that business, but not on its world-wide income (Subsection 1(b)); a state may tax persons not nationals, residents or domiciliaries of the state with respect to income derived from property in the state (Subsection 1(c)), but the existence of such property and income does not justify taxation of other property or income outside the state. These limitations are implied in the bases of jurisdiction required by § 402 and the principle of reasonableness in § 403.

The jurisdiction to tax *nationals, residents or domiciliaries* (Subsection (1)(a)) applies as well to complex commercial enterprises, permitting a state to tax a parent corporation on its world-wide income, including that of its branches and subsidiaries. (Emphasis ours.)

necessarily (assuming California is the only state in which U.S. operations are conducted) California will be taxing foreign source income as that term has been defined and recognized internationally for federal and foreign income tax purposes. In the context of harmonizing international tax systems among tax treaty partners, this is an unacceptable development.

Given the increasing values and geographic dispension of multinational business activities, and given the awareness by the Treasury of the accelerating force with which California reputedly has been applying the unitary tax method to worldwide operations, it is to the Treasury's credit that it has, by including Article 9(4) in the UK Treaty, asserted the federal prerogative over international tax relationships. Those relationships have a direct bearing on the conduct of foreign trade, on the balance of payments, and, indeed, on international relations.

* * * *

CONCLUSION

It clearly is in the national interest to ratify the UK treaty, including Article 9(4), and I urge this committee to recommend that it be so ratified. The concerns of the state of California and other states are by no means serious enough to warrant a reservation of Article 9(4) from the treaty, and thus deprive the nation as a whole from the benefits of that article.

I thank the Committee for its attention.

Appendix B

PREPARED STATEMENT OF CHARLES M. WALKER, FORMER ASSISTANT SECRETARY OF THE TREASURY FOR TAX POLICY

Mr. Chairman and members of this distinguished committee: I am pleased to appear here today to testify in support of the new income tax convention with the United Kingdom.

First, let me introduce myself. I am a lawyer residing and practicing in Los Angeles, California. I had the privilege of serving as Assistant Secretary of the Treasury for Tax Policy from early September, 1975, to January 20, 1977. One of the functions of my office was the negotiation of tax treaties and the preparation of treaty documents, protocols thereto, and notes exchanged thereon for signature by appropriate officials of our government. As a matter of fact, I had the privilege of appearing before this Committee on November 7, 1975, to present testimony in support of new tax treaties with Iceland, Romania, Poland, and the Union of Soviet Socialists Republics.

The income tax convention with the United Kingdom (which I will refer to as the United Kingdom Tax Treaty) had been negotiated before I assumed my duties with the Treasury Department. However, signature of the Treaty occurred thereafter, as did the exchange of notes thereon dated April 13, 1976.

* * * *

The unitary method employed by California is not used for federal or foreign tax purposes. Thus, if California's use of the unitary method produces an amount of taxable income for the subsidiary which exceeds the amount determined on a separate corporate and arm's length basis, then